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No. 92-297

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

JEFF KOONS,
Petitioner,
v.
ART ROGERS and
SONNABEND GALLERY, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONER

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Respondent Rogers opposes review by arguing that the questions raised here address only two of the determinations made by the Second Circuit in a multi-factor, fact-based decision. This argument is wrong for at least two reasons. First, it is clear that the errors raised by petitioner were central to the court's finding of copyright infringement. Second, in addressing those issues, the court enunciated general rules of law that will affect the scope of the fair-use defense in many different cases. Respondent, in turn has made little effort to show that these rules are either unimportant or legally valid.

1. The suggestion that, in denying petitioner's fair-use claim, the court of appeals merely balanced a large number of relevant factors ignores the fundamental nature of the decision rendered below. The Second Circuit

flatly ruled, on highly questionable grounds, that petitioner's sculpture was a form of "commercial" exploitation and was not a parody or satire. While the court then went on to address additional "fair use" factors, these two basic determinations *controlled* the outcome. Thus, when the court reached what is supposed to be the most important question—whether Koons' work threatened any market injury to Rogers—it *presumed* such injury (in the absence of real evidence and contrary to common sense) based on its prior characterization of the sculpture as a commercial product. *See* Pet. 11.[1] Petitioner merely asks the Court to determine whether this line of reasoning makes sense. This Court has in the past agreed to review the application of the fair-use factors, *see Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985), and nothing about the posture of this case, or the scope of petitioner's arguments, counsels against similar review here.

Nor can it really be contended that the Second Circuit's ruling is "fact specific." The court flatly ruled that receipt of substantial prices for works of fine art renders such art "commercial." It also held that an otherwise parodic work cannot be a parody if the prior work is not well known and is not displayed in conjunction with presentation of the parody. These rulings, for the reasons we have stated, reflect little understanding of the

[1] Similarly, respondent notes that the court of appeals objected to the *amount* of the copying undertaken by petitioner, speculating that a "similar result might [thus] have been reached here even under Koons' view of the proper scope of parody and satire." Br. in Opp. at 17. It is hardly clear, however, that if the Second Circuit had understood the sculpture to be an otherwise protected form of artistic commentary, it would still have found infringement on the basis of the amount of copying. *See* Pet. 20 n.21 (citing authorities for the proposition that a valid critique may make substantial use of a prior work).

policies underlying the fair-use doctrine, and will have serious consequences in the broad run of copyright cases that are brought in the Second Circuit and elsewhere.

2. Respondent's efforts to defend the decision of the court of appeals on the merits are plainly unavailing. On the commerciality issue, for example, respondent says literally nothing about why fine artists who seek compensation should be treated differently from authors, critics, journalists, and scholars who often succeed in asserting the fair-use defense when they are paid for what they produce. That issue needs to be resolved.

Respondent does suggest that petitioner should merely have paid for permission to use the Rogers photograph, and that his failure to do so renders his work commercial. Br. in Opp. at 13. But this argument only serves to demonstrate the need for review in this case. In making the argument, respondent joins the Second Circuit in emphasizing this Court's statement in *Harper & Row* that the "crux" of the commercial noncommercial distinction is "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Id.* (quoting 471 U.S. at 562). As noted in the petition, however, this "test" only made sense in a case where the alleged infringer had appropriated a specific right (the right of first publication) that had in fact been sold to others (thereby causing actual commercial injury). Pet. 13 n.14. It will eviscerate fair use if other courts follow the Second Circuit in requiring payment of a "customary price" in every case—*i.e.*, even where there is no such custom and the right at issue would never be sold.

Thus, here, obvious problems will arise if post-modern artists, seeking to ridicule works in mass culture, are forced to seek permission from the creators of prior works. *See* Pet. 23. One of the basic purposes of authorizing non-consensual fair use is to allow subsequent creative efforts that criticize prior works. In such a context,

a licensing scheme is useless.[2] In sum, it remains clear that the lower courts have no idea about how to apply the commercial-use factor in fair-use cases, and that this uncertainty needs to be resolved in light of this Court's statement in *Sony Corp. of America v. Universal City Studios*, 464 U.S. at 451, that commercial use creates a presumption of market injury.

Similarly, respondent offers no real explanation about why petitioner forfeited characterization of his work as a "parody" when he selected a prior work that was not well known to the audience for the sculpture. Petitioner obviously had valid artistic reasons for choosing to base his work on a typical example of mass culture. Moreover, the recognizability of the object of a parody says nothing about the actual impact of the "use" on the commercial interests of the creator of the prior work. This factor therefore bears no relation to the purposes of copyright that should control the outcome in this kind of case. Indeed, the Second Circuit dramatized this fact when it stated that petitioner would have qualified for greater protection if only he had displayed the Rogers photograph with his sculpture. *See* Pet. 17. If he had done so, of course, the potential market impact on Rogers would only have been heightened.

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[2] Respondent's brief asserts that Koons "routinely, and successfully, sought written permission from copyright owners" in the past. Br. in Opp. at 11. To the contrary, Koons has clearly maintained that he has never sought or needed "permission." The correspondence contained in the record (JA 96-132) represents requests from Koons to liquor and cigarette manufacturers to borrow the original, full-size printers' negative plate for temporary use (JA 362). Simply because the manufacturers responded by granting "permission" does not mean that Koons ever viewed this as necessary. Koons did not consider permission necessary in this case (JA 302-306, 315-319) and did not consider it necessary for any of the twenty Banality works (JA 327-343).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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